

At the time of the preliminary hearing, respondent had provided medical treatment for claimant's left elbow which claimant injured in a fall from scaffolding. But respondent

denied that claimant sustained any other injuries. Claimant sought additional medical treatment for his back, shoulder and knee.

After the September 6, 2007, preliminary hearing an Order, dated September 18, 2007, was entered which provided:

Dr. Do is to perform an Independent Medical Examination fo[r] the purpose of obtaining a causation opinion and treatment recommendations. Dr. Do is authorized to treat any conditions that he relates to the Claimant's 5-7-07 fall.

Initially, it must be determined whether the Order exceeds the ALJ's jurisdiction. The second sentence in the Order authorizes the doctor to treat any conditions that the doctor, not the ALJ, relates to the claimant's fall at work. The ALJ has not only the jurisdiction but also the duty to make an independent adjudication of the facts.¹ In this respect the ALJ has exceeded his jurisdiction by delegating to the physician the determination whether claimant's alleged injuries arose out of and in the course of employment.

Although the ALJ can request a causation opinion from the physician, it is the ALJ who must then consider that evidence in conjunction with the entire evidentiary record and make the decision whether claimant's injuries were caused by the work-related accident. The ALJ has the statutory authority and duty to make factual determinations in workers compensation cases. That power is vested by statute in the ALJ and cannot be delegated to the physician. It is impermissible for the ALJ to delegate the statutory duty to determine the issue of causation in a worker's compensation case. Consequently, the second sentence in the Order is an impermissible delegation of the ALJ's statutory authority, exceeds the jurisdiction of the ALJ and is stricken from the Order.

It must next be determined whether the Board has jurisdiction to review the remainder of the ALJ's order. The first sentence in the ALJ's September 18, 2007 Order designates a physician to conduct an independent medical examination (IME). Under K.S.A. 44-516 the ALJ is entitled to appoint an independent physician to evaluate the claimant for various reasons. In this case, the ALJ ordered an independent medical examination for an opinion on causation as well as treatment recommendations.

The ALJ's decision to have an independent medical examination performed on the claimant is interlocutory in nature and made during the litigation of a worker's compensation case pending before the ALJ. This is not a final order that can be reviewed pursuant to K.S.A. 44-551. Neither is this an order entered pursuant to the preliminary hearing statute K.S.A. 44-534a, as preliminary hearing orders are limited to issues of furnishing medical treatment and payment of temporary total disability compensation. The

¹ See K.S.A. 44-523; K.S.A. 44-534; K.S.A. 44-534a; and K.S.A. 44-551.

Order pertains to an interlocutory matter, ordering an independent medical examination, over which an ALJ has authority to order during the litigation of the case.

Because the Act specifically grants an ALJ the authority to appoint neutral health care providers to evaluate injured workers², the Judge did not exceed his jurisdiction and authority by ordering the evaluation. As such, it is an interlocutory order, not an award of compensation. The ALJ's order states that the IME is for an opinion on causation and for treatment recommendations. The Board is without jurisdiction to review the ALJ's interlocutory order. Accordingly, this appeal is premature. Absent the now stricken sentence allowing Dr. Do to provide treatment, the preliminary hearing is ongoing and the ALJ has not decided the issue respondent is appealing.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated September 18, 2007, is modified to strike the second sentence and otherwise remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of December 2007.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: J. Shawn Elliott, Attorney for Claimant
Bill W. Richerson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

² See K.S.A. 44-510e and K.S.A. 44-516.

³ K.S.A. 44-534a.

⁴ K.S.A. 2006 Supp. 44-555c(k).